

DEPARTURES



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NEW CASES

Departures Overview and Case Law Summary

Introduction

Since the *Koon*¹ decision, district courts have greater flexibility in determining the appropriate sentencing in cases that differ from the “heartland” of cases involving federal crimes. The interplay of statutes, guideline provisions, and case law largely defines the parameters within which courts make departure decisions.

While statutory provisions grant courts the authority to depart in cases involving aggravating or mitigating factors not adequately considered by the Commission that warrant a sentence outside the applicable range, guideline provisions have identified certain factors the Sentencing Commission has characterized as forbidden, encouraged, discouraged or unmentioned grounds for departure. The Commission’s position on forbidden and encouraged factors is relatively clear. Factors discouraged by the Commission have been identified by courts as a valid basis for departure only if present to an “extraordinary” or “exceptional” degree. Most case law departure decisions however have addressed factors unmentioned by the Commission.

I. *Koon v. United States*

In *Koon v. United States*, 116 S. Ct. 2035 (1996), the Supreme Court examined the issue of the standard of review to be applied by appellate courts in assessing district court departure decisions. The Court unanimously joined in Justice Kennedy’s opinion that an appellate court should not review a district court’s departure decision *de novo*, but instead should ask whether the sentencing court had abused its discretion in granting the departure.

In reaching its decision, the Court emphasized the role the Sentencing Commission has in monitoring district court decisions and refining the guidelines to specify precisely when departures are permitted. The Court noted that before a departure is authorized, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the sentencing guidelines. The Court further noted that sentencing courts are provided “considerable guidance” in this area by the *Guidelines Manual* as to which factors are likely or not likely to make a case atypical. The Commission has also recognized some factors which are “encouraged” and which the Commission has not been able to take into account fully in the guidelines such as victim provocation and disruption of a governmental function. *Id.* at 2045. A number of factors are regarded by the sentencing guidelines as “discouraged” such that the factor should be used only in exceptional cases. These factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Examples include the defendant’s family ties and

¹518 U.S. 81 (1996).

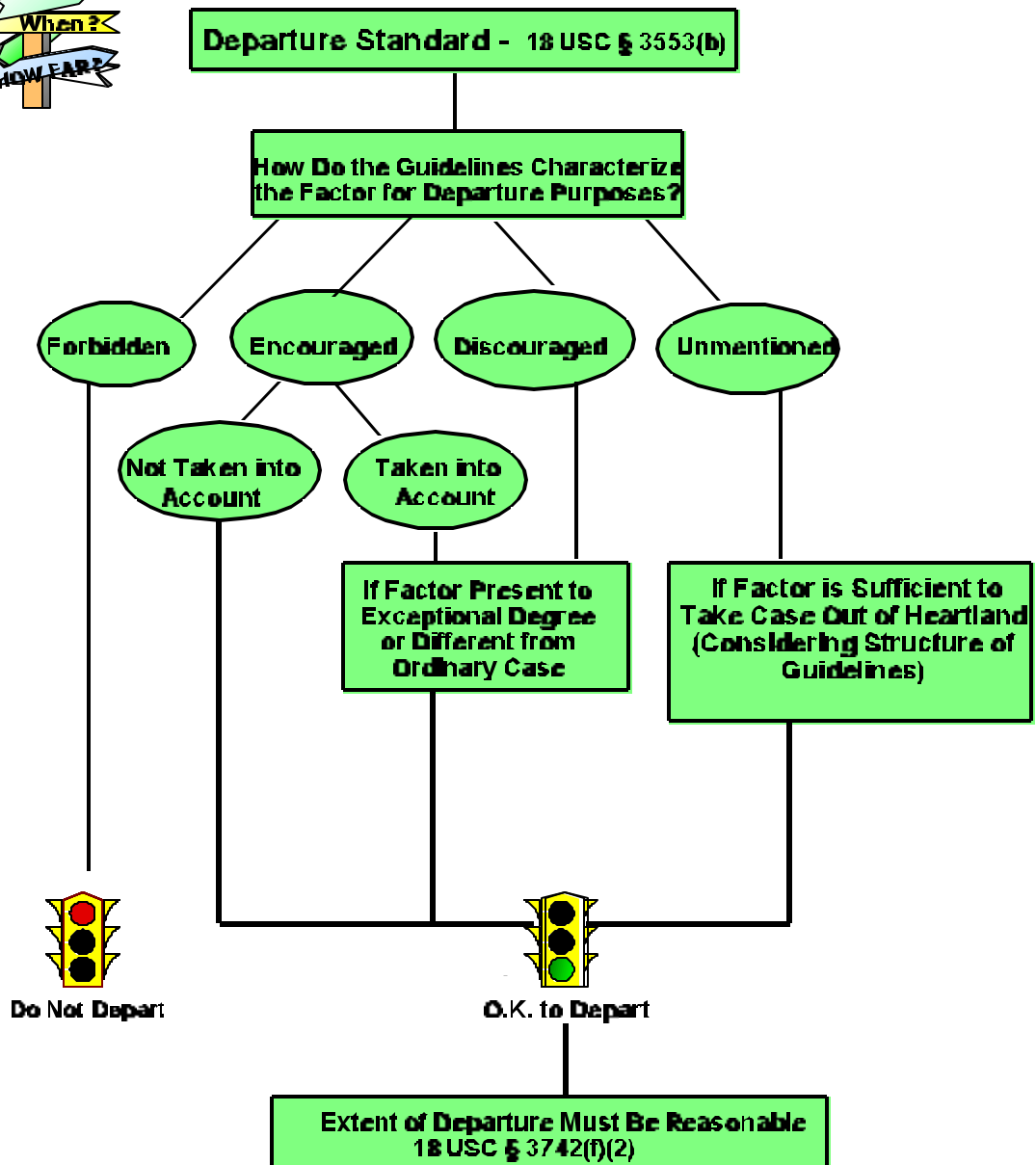
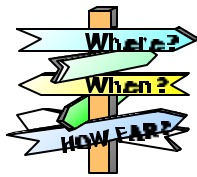
responsibilities, education or vocational skills, and military service. *Id.* If a factor is one upon which the Commission encourages departure, and that factor is not taken into account by the applicable guideline, a court may exercise its discretion and depart on that basis, but, if the encouraged factor is already taken into account the applicable guideline, or if the factor is discouraged, the sentencing court may depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case in which the factor is present. *Id.* In addition, a number of factors such as race, sex, national origin and religion have been categorized as “forbidden” considerations in the departure decision process. *Id.* Finally, if a factor is unmentioned in the guidelines, the court must, after considering the “structure and theory of both relevant guidelines, and the guidelines taken as a whole,” decide whether it is sufficient to remove it from the heartland cases. *Id.* The court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the *Guidelines Manual* will be “highly infrequent.” *Id.* The Court also stated that whether a factor is a permissible basis for departure under any circumstances is a question of law, reviewable *de novo*, and the court of appeals need not defer to the district court’s resolution of the point. *Id.* at 2047.

Ultimately, a divided Court held that the district court in *Koon* had not abused its discretion in making a downward departure based on (1) the victim’s misconduct in provoking the defendant’s offenses, (2) susceptibility to abuse in prison, and (3) successive prosecutions. The Court found that the district court had abused its discretion, however, in making downward departures based on (1) the defendant’s low likelihood of recidivism and (2) the defendant’s collateral employment consequences because those factors had been adequately considered by the Commission.

II. Departure Analysis Roadmap

The following flow chart was designed as a user friendly roadmap that outlines, step-by-step, the departure analysis set forth in the *Koon* case: 1) Identify the departure factor; 2) Determine how the factor is characterized under the guidelines —forbidden, encouraged, discouraged, or unmentioned, and; 3) Determine the extent of the departure. The statutory authority, guideline provisions, and departure case law decisions that follow parallel the steps set forth in the Departure Analysis Roadmap.

DEPARTURE ANALYSIS ROADMAP



ADDITIONAL KEY POINTS

- Court must specify reasons for departure and extent of departure
- If choosing not to depart, court should make clear its decision is an informed, discretionary one

III. Statutory Authority for Departures

A. 18 U.S.C. § 3553

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable guideline range in an ordinary case (18 U.S.C. § 3553(a)), it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the guideline range if the court finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described" (18 U.S.C. § 3553(b)), or when the guidelines otherwise specifically provide for a departure.²

B. 18 U.S.C. § 3742(a), (b)

Before the guidelines system was instituted, a federal criminal sentence within the statutory limits generally was not reviewable on appeal.³ The Sentencing Reform Act of 1984 altered this scheme in favor of limited appellate jurisdiction to review federal sentences. Among other options, it allows a defendant to appeal an upward departure, and the government to appeal a downward departure.

IV. Guideline Provisions

In §5K2.0 of the U.S. Sentencing Guidelines, the Commission tracked the departure authority given to district courts in Title 18 U.S. Code § 3553(b) which provides that a court is permitted to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Once this standard is met, the district courts have discretionary power to determine whether, and to what extent, departures are warranted.

This discretionary power is limited, only to the extent that the guidelines prohibit or limit departures. For example, forbidden departure factors are: Sections 5H1.10 (Race, Sex National Origin, Creed Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse, and the last sentence of §5K2.12 (Coercion and Duress). Chapter Five, Part K, lists factors that the

²This document does not discuss sentencing below the mandatory minimum under 18 U.S.C. § 3553(e) for substantial assistance upon motion from the government.

³*Dorszynski v. United States*, 418 U.S. 424 (1974) (reiterating the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end).

Commission has identified as encouraged factors that may constitute grounds for departure but considers this list as non-exhaustive. The Commission also has determined certain discouraged factors as grounds for departure, although relevant in “extraordinary” or “exceptional” cases: Sections 5H1.1 (Age), 5H1.2 (Education and Vocational Skills), 5H1.3 (Mental and Emotional Conditions), 5H1.4 (Physical Condition, Including Drug and Alcohol Dependence or Abuse), 5H1.5 (Employment Record); §5H1.6 (Family Ties and Responsibilities and Community Ties), 5H1.11 (Military, Civic, Charitable, or Public Service; Employee-Related Contributions; and Record of Prior Good Works).

Other specific commentary within selected guideline provisions and issues regarding adequacy of criminal history (§4A1.3) also provide encouraged or discouraged grounds for guideline departures.

V. Post-Koon Appellate Court Departure Decisions

The power of district courts to depart was arguably broadened somewhat by the 1996 *Koon* decision. Although *Koon* established a new “abuse of discretion” standard of review to be applied in assessing district court departure decisions, *Koon* permitted certain key issues to remain intact that were considered *not* to be subject to a deferential standard: (1) Whether the factor being considered has taken the case outside the heartland; (2) whether the Sentencing Commission has already taken into account the factors the sentencing court identified as a basis for departure; and (3) whether or not there was an abuse of discretion exercised by the district court.

As the appellate courts continued to apply the *Koon* analysis, and considered the relevant guideline provisions when applicable, district court decisions to depart have been reversed, affirmed, and, in some cases, upheld for *refusing to depart* upward or downward based on various factors.

A. FORBIDDEN FACTORS

The Commission has listed forbidden departure factors that courts cannot take into account as grounds for departure: Section 5H1.10 (Race, Sex National Origin, Creed Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse, and the last sentence of §5K2.12 (Coercion and Duress); §5K2.19 (Post-Sentencing Rehabilitative Efforts).⁴

B. ENCOURAGED FACTORS

⁴ Effective November 1, 2000, §5K2.19 (Post-Sentencing Rehabilitative Efforts) was added as a forbidden departure factor. The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when re-sentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person, and (2) inequitably benefit only those who gain the opportunity to be resentenced *de novo*. This amendment does not restrict departures based on extraordinary post-offense rehabilitative efforts prior to sentencing.

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” Chapter Five, Part K, lists such factors that the Commission has identified as encouraged factors that may constitute grounds for departure but considers this list to be non-exhaustive.

- **Death — §5K2.1.**

- ***Involuntary Manslaughter Victim.*** *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), *cert. denied*, 120 S. Ct. 317 (1999), vacated and remanded for further findings in accordance with the dictates of the guidelines where the district court departed upward 4 levels for the uncharged death of a participant in the aggressive driving that led to the defendant’s conviction for involuntary manslaughter. The court determined that the district court should have made findings to support the level of departure, including findings on whether the defendant’s recklessness was adequate to establish malice.
- ***Kidnaping Victim.*** *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998), upheld upward departure to life imprisonment based on the kidnaping victim’s death. In this case, the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to murder her. Because the kidnaping guideline did not take into account these facts, an upward departure to life imprisonment based on the kidnaping victim’s death was not an abuse of discretion.

- **Extreme Psychological Injury — §5K2.3.** *United States v. Helbing*, 209 F.3d 226 (3d Cir. 2000), held that the district court did not abuse its discretion in departing upward two levels for emotional and psychological injuries caused to victims in a fraud case involving embezzlement from a pension fund and wire fraud. The victims incurred the humiliation of being forced to seek work at an advanced age and rely on help from family members, the trauma that comes with losing one’s savings, and the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from tax authorities.

S *United States v. Jacobs*, 167 F.3d 792 (3d Cir. 1999), vacated and remanded a 5-level upward departure under §5K2.3 for “extreme psychological injury” because the district court did not find that the victim’s psychological injury was “much more serious than that normally resulting from the commission” of the crime of aggravated assault, a finding that is a prerequisite for a departure under §5K2.3. The district court focused on a portion of the guideline that explains the types of situations which may rise to the level of psychological injury without making the preliminary finding of injury beyond the heartland of injuries from the same offense.

S ***Extreme Psychological Injury Resulting from Bank Robbery.*** *United States v. Sawyer*, 180 F.3d 1319 (11th Cir. 1999), upheld a 2-level upward departure for extreme psychological injury (§5K2.3) to bank tellers who were employed at the bank the defendant robbed. The court noted that a departure for extreme psychological injury is warranted if it is “much more serious than that normally resulting from commission of the offense.” More than two and one-half years after the robbery, the victims still did not feel safe at work, were especially cautious entering and leaving the bank, and had restricted their daily activities. Upon extensive review of the record, the court found that the district court did not abuse its discretion in departing two levels upward for extreme psychological injury.

- **Abduction or Unlawful Restraint — §5K2.4.** *United States v. Footman*, 215 F.3d 145 (1st Cir. 2000), upheld an upward departure based on the abduction of two minors in front of fellow prostitutes on two separate occasions during a conspiracy to transport women across state lines for the purpose of prostitution. The abductions occurred in November, 1996 and February, 1997. The record of evidence supported the conclusion that defendant carried out these attacks in front of other prostitutes in order to send a message. Since the abductions occurred during the time period of the conspiracy and clearly “facilitated” the commission of the conspiracy, an upward departure under §5K2.4 was warranted.

- **Disruption of a Government Function — §5K2.7.**

S ***Departure Based on Defendant’s Fraudulent Medicare Scheme.*** *United States v. Regueiro*, 2001 WL 98549 (11th Cir., Feb. 6, 2001), affirmed an upward departure based on a disruption of governmental function because of defendant’s fraudulent medicare scheme. The court noted that each time one of the more than 100 nursing groups that the defendant helped organize and establish fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide medical care to eligible Medicare patients. Through the fraudulent billing and the loss of over \$15 million, those monies were no longer available for the medical care of the persons in this program.

S ***Departure Based on Defendant’s Involvement in Police Scandal.*** *United States v. Baird*, 109 F.3d 856 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997), affirmed an upward departure based on consideration of underlying counts dismissed pursuant to a plea agreement. The district court found that the defendant’s involvement in a large police corruption scandal in Philadelphia caused a significant disruption of governmental functions pursuant to §5K2.7 and warranted an upward departure.

S ***Extent of Departure Based on Disruption of Government Function.*** *United States v. Horton*, 98 F.3d 313 (7th Cir. 1996), reversed in part an upward departure and remanded for a determination of the extent of the departure “in view of the scant grounds

articulated.” The basis for the upward departure, that the defendant’s conduct resulted in a significant disruption of a governmental function, was affirmed.

- **Extreme Conduct—§5K2.8.** *United States v. Davis*, 170 F.3d 617 (**6th Cir.**), 120 S. Ct. 151 (1999), affirmed an 8-level upward departure for extreme conduct based on a telemarketer’s extremely demeaning conduct toward his victims, noting that, although there was no serious physical injury, there was an intentional infliction of psychic injury. The court of appeals reversed the upward departure on the same basis for a codefendant who the district court had described as using a “friendly demeanor that resulted in psychological harm to his victims.”
- **S Second Degree Murder Case.** *United States v. Roston*, 168 F.3d 377 (**9th Cir.**), *cert. denied*, 120 S. Ct. 11 (1999), affirmed a 7-level upward departure under the “extreme conduct” provision of the sentencing guidelines (§5K2.8). The court noted that evidence presented at the sentencing hearing showed that the defendant severely beat and strangled his wife before throwing her body overboard on the final night of their honeymoon cruise. As compared to other second-degree murder cases, the severity of the crime and the unusually cruel circumstances of the death of the defendant’s wife warranted an upward departure of seven levels.
- **Victim’s Misconduct—§5K2.10.** *United States v. LeRose*, 219 F.3d 335 (**4th Cir.** 2000), reversed district court’s downward departure for victim misconduct where the bank’s delay in confronting the defendants about the handling of their accounts in no way goaded the defendants into launching a check-kiting scheme. The court noted that §5K2.10 provides that in cases of non-violent offenses, “provocation and harassment” of the defendant by the victim may warrant a departure for victim misconduct. Defendant’s lack of action neither provoked nor led to the fraud and was not conduct that was contemplated by §5K2.10.
- **Lesser Harms—§5K2.11.** *United States v. Clark*, 128 F.3d 122 (**2d Cir.** 1997), remanded for reconsideration the district court’s denial of downward departure based on the lesser harms paragraph of §5K2.11 for a felon who had illegally purchased a firearm for his brother. The court noted that the second paragraph, where a defendant’s conduct might not have caused the harm sought to be prevented, might have applied, and the district court may have misunderstood its authority to depart. *See also United States v. Bernal*, 90 F.3d 465 (**11th Cir.** 1996) (affirmed a downward departure based on a finding that defendant’s conduct did not threaten the harm sought to be prevented by the statutes of conviction).
- **Coercion and Duress—§5K2.12.** *United States v. Gallegos*, 129 F.3d 1140 (**10th Cir.** 1997), vacated and remanded a downward departure based, among other things, on coercion, where the only evidence was the defendant’s comment that she would not testify against a codefendant because she was scared. Coercion must involve a threat of physical injury, substantial damage to property or similar injury, and it must also occur at the time of the offense.

- **Diminished Capacity—§5K2.13.** *United States v. Valdez*, 158 F.3d 1140 (**10th Cir.** 1998), affirmed district court’s refusal to depart downward for non-violent offense, under §5K2.13, where defendant committed bank robbery while suffering from significantly reduced mental capacity.
- **S Volitional Impairment.** *United States v. McBroom*, 124 F.3d 533 (**3d Cir.** 1997), vacated and remanded where the district court failed to make a factual finding regarding the possibility that the defendant suffered from a volitional impairment which prevented him from controlling his behavior or conforming to the law. The appellate court agreed with the defendant that the definition of “significantly reduced mental capacity” contained a volitional component not adequately considered by the district court when determining the defendant’s eligibility for a downward departure pursuant to §5K2.13.
- **Public Welfare—§5K2.14.** *United States v. Nathan*, 188 F.3d 190 (**3d Cir.** 1999), reversed and remanded an upward departure based on the defendant’s actions being considered a threat to national security. There was not evidence in the record to show that confidential information was disclosed to Russia or the Ukraine by the defendant. The district court found that defendant’s conduct created a national security risk despite insufficient evidence to support its conclusion. The court determined that the district court clearly erred in departing upward based on findings contrary to the record. *See also, United States v. Hardy*, 99 F.3d 1242 (**1st Cir.** 1996) (affirmed an upward departure based on defendant’s persistent ten-year history of violent antisocial behavior and dangerous gang-related conduct underlying the offense).
- **Voluntary Disclosure of Offense—§5K2.16.** *United States v. Jones*, 158 F.3d 492 (**10th Cir.** 1998), upheld a downward departure based in part on the defendant’s voluntary disclosure of facts underlying his false statements offense. While the defendant was not motivated by the knowledge that discovery of his offense was imminent, as required for departure under §5K2.16, the offense was nonetheless likely to be discovered. Thus, the circumstances fall under the express provisions of §5K2.16. The fact that the defendant received a 3-level downward adjustment for acceptance of responsibility does not preclude departure on this basis; the acceptance reduction is easily achieved where the defendant enters a timely guilty plea.

- **Aberrant Behavior — §5K2.20.**⁵
- **Dismissed and Uncharged Conduct — §5K2.21.**⁶

SPECIFIC COMMENTARY DEPARTURES

Specific commentary under selected guidelines set forth in Chapter Two and Chapter Three provide encouraged grounds for upward or downward departures.

- **First Degree Murder — §2A1.1.** *United States v. Nichols*, 169 F.3d 1255 (**10th Cir.**), *cert. denied*, 1999 WL 462439 (Oct. 12, 1999), upheld the district court’s refusal to depart based on the defendant’s contention that he did not cause death intentionally or knowingly, pursuant to §2A1.1, comment. (n.1). Nichols argued that the district court was required first to make findings regarding the defendant’s mental state in its determination whether a downward departure is appropriate. The court of appeals held that nothing in the guideline requires the district court to make any such findings before deciding whether to depart, disagreeing with *United States v. Prevatte*, 16 F.3d 767, 784 (7th Cir.1994).
- **Involuntary Manslaughter (Excessive Recklessness) — §2A1.4.** *United States v. Whiteskunk*, 162 F.3d 1244 (**10th Cir.** 1998), upheld a 3-level upward departure for excessive recklessness based on the court’s finding that defendant’s conduct exceeded reckless behavior, and therefore exceeded the guidelines. The defendant was convicted of involuntary manslaughter. The court cited certain factors that took defendant’s conduct of driving while intoxicated out of the heartland of typical involuntary manslaughter cases: she had a blood alcohol content that was more

⁵Effective November 1, 2000, §5K2.20 (Aberrant Behavior) was added as an encouraged basis for a downward departure in an extraordinary case if the defendant’s conduct constituted aberrant behavior. The Commission attempted to slightly relax the “single act” rule and provide guidance and limitations regarding what can be considered aberrant behavior. This policy statement provides that the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

⁶Effective November 1, 2000, §5K2.21 (Dismissed and Uncharged Conduct) was added as an encouraged basis for an upward departure to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

- than twice the legal limit, that she had sustained prior conviction for driving while intoxicated, and that she had at least three opportunities to correct her behavior.
- **Extortion—§2B3.2.** *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998), upheld a 2-level departure based on an application note to the extortion guideline, which states that an upward departure may be warranted if the offense involved a *threat to a family member of the victim*. The defendants were convicted of interference with interstate commerce by threats of violence after kidnapping the daughter of a hotel owner and demanding ransom. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.
 - **Unusually High Purity Level of Heroin—§2D1.1.** *United States v. Cones*, 195 F.3d 941 (7th Cir. 1999), reversed an upward departure based on the conversion of traditional street-level purities from 250 grams of 70 percent pure heroin. Even though the court reversed the upward departure, it found that the only function of Application Note 9 to §2D1.1 is to determine whether a higher sentence is probative of the defendant's role or position in the chain of distribution. When higher purity implies a higher role in a criminal organization, departure should be limited to the number of levels that could be awarded under §3B1.1. The court noted that statutes and guidelines allow conversion to a uniform purity for PCP and methamphetamine, and the guidelines now allow a conversion for LSD. For drugs other than LSD, PCP, and methamphetamine, the sentence must be calculated without an adjustment to a uniform purity level. *See also United States v. Doe*, 149 F.3d 634 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 260 (1998) (affirmed 6-level upward departure to account for the concentrated form of heroin involved).
 - **Large Quantities of Drugs—§2D2.1.** *United States v. Warren*, 186 F.3d 358 (3d Cir. 1999), reversed an upward departure based on large quantities of drugs involved in a simple possession case, although such factor was encouraged as a grounds for upward departure in the Commentary under §2D2.1. The district court relied in part on Application Note 1 to §2D2.1 which states "... Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted." The court found, based on the record, that the defendant *did not* intend for anyone to consume the large quantities of drugs but only intended to turn those drugs over to government agents and did so. In such a situation the court concluded that the district court abused its discretion in utilizing Application Note 1 of §2D2.1 or §5K2.0 as a basis for an upward departure based on quantity of drugs.
 - **Fraud—§2F1.1.** *United States v. Robie*, 166 F.3d 444 (2d Cir. 1999), vacated a sentence wherein the district court had erroneously based its calculation of loss on the gain to the defendant. On remand, the district court was instructed to depart under Note 11 of §2F1.1 which states "where the loss determined does not fully capture the harmfulness of the conduct, an upward departure may be warranted." The Postal Service was the victim of defendant's theft of misprinted postal stamps sold to stamp collectors. No "direct" loss was suffered by the Postal Service since the no value attached to the stamps beyond their destruction. The real but intangible loss in the form

of embarrassment and the appearance of incompetence that inflicted the Postal Service warranted an upward departure under this provision. *See also United States v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998), *cert. denied* 119 S.Ct. 1127 (1999)(reversed and remanded for reconsideration a downward departure based on the economic reality of the intended loss); *United States v. Wells*, 101 F.3d 370 (5th Cir. 1996) (affirmed upward departure based on Note 11, §2F1.1, regarding substantial harm to victims stemming from a credit card scheme).

- **Number of False Documents — §2L2.1.** *United States v. Velez*, 168 F.3d 1137 (9th Cir. 1999), reversed an upward departure based on the number of false documents involved. The court of appeals held that the language in §2L2.1 (b)(2) indicated that the Commission had considered situations in which the number of documents exceeded 100. The court of appeals further stated that the subsequent addition of application note 5 under §2L2.1, which allowed for an upward departure on these grounds, did not change the court's analysis.
- **Hate Crime Motivation or Vulnerable Victim — §3A1.1.** *United States v. Brown*, 145 F.3d 477 (6th Cir. 1998), upheld an upward departure based on the age of telemarketing victims. Congress expressed the view, manifested in the Senior Citizens Against Marketing Scams Act, that the guidelines do not sufficiently punish the defendants who target the elderly. The court noted that such offense behavior is not adequately accounted for by relevant conduct, role in the offense, or vulnerable victim adjustments.
- **Aggravating or Mitigating Role in the Offense — §§3B1.1 and 3B1.2.** *United States v. Romualdi*, 101 F.3d 971 (3^d Cir. 1996), reversed a downward departure based on a finding that the defendant's conduct, possession of child pornography, was analogous to a situation qualifying for a mitigating role reduction. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise. *See also United States v. Cali*, 87 F.3d 571 (1st Cir. 1996)(affirmed an upward departure based on a finding that the defendant's management of the assets of a large-scale criminal enterprise was outside the heartland of the aggravated role adjustment).

Other encouraged departure factors based on specific commentary not mentioned above are: §§2A3.1-2A3.4 (upward departure may be warranted if defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense); §2B3.1, Note 5 (upward departure may be warranted if defendant intended to murder victim); §2D1.1, Note 14 (downward departure may be warranted if defendant's base offense level is 36, if the base offense level overrepresents defendant's culpability in criminal activity, and if defendant qualifies for a mitigating role adjustment under §3B1.2); §2D1.1, Note 15 (downward departure for defendant's purchase of a greater quantity of drugs than defendant is capable of actually supplying during a reverse sting); §2D1.7, Note 1 (upward departure for large scale dealer; downward departure for offense committed not for pecuniary gain); §2D2.3,

Background Commentary (downward departure if no or only a few passengers were placed at risk; upward departure if death or serious bodily injury of a large number of persons occurred but is not accurately reflected in resulting offense level); **§2L1.1, Note 3** (where alien was smuggled by defendant knowing that the alien intended to engage in serious criminal activity, upward departure may be warranted); **§2L1.1, Note 4** (if offense involved more than 100 aliens, upward departure may be warranted); **§2L1.2, Note 3** (defendant's repeated prior instances of deportation may warrant an upward departure).

Sections 2M4.1, 2M5.1, Comment. (if offense was committed during time of war or armed conflict upward departure may be warranted); **§2N1.1** (offense posed risk of death or serious bodily injury, mental damage or psychological damage to numerous victims, or property loss, upward departure may be warranted; otherwise, where no such risk was posed, downward departure may be warranted); **§§ 2N1.2, 2N1.3, 2N2.1, Comment.** (offense posed risk of death or serious bodily injury, mental damage or psychological damage to numerous victims, or property loss, upward departure may be warranted); **§2P1.1, 2P1.3, 2Q1.1, Comment.** (if death or bodily injury resulted, upward departure may be warranted); **§2Q1.2, Note 9** (upward departure may be warranted where defendant previously engaged in similar conduct established by civil adjudication or has failed to comply with an administrative order); **§3A1.1, Note 4** (if subsection enhancement under the guideline applies and defendant has a prior sentence for an offense involving a vulnerable victim, upward departure may be warranted); **§3A1.2, Note 2** (upward departure may be warranted in cases involving certain high-level officials, such as the President and Vice President, to reflect potential disruption of governmental function); **§3A1.3, Note 3** (if restraint was sufficiently egregious, upward departure may be warranted); **§3B1.4, Note 3** (upward departure warranted where defendant used or attempted to use more than one person less than 18 years); **§3C1.2, Note 6** (where there is a higher degree of culpability an upward departure above the 2-level increase permitted under this guideline may be warranted).

CRIMINAL HISTORY DEPARTURES (CHAPTER FOUR)

The guidelines suggest that in considering a departure for adequacy of criminal history category, the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category. If, for example, the court concludes that Criminal History Category III underrepresents the seriousness of the defendant's criminal history, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. §4A1.3, p.s. These departures are referred to as horizontal, because they move along the horizontal axis of the Sentencing Table.

Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case. §4A1.3, p.s. Some examples of appellate court analyses of criminal history departures follow:

- ***Departing Horizontally to Reflect the Seriousness of Offense Conduct.*** *United States v. Lawrence*, 161 F.3d 250 (**4th Cir.** 1998), *cert. denied*, 119 S. Ct. 1279 (1999), and *appeal after remand*, *United States v. Lawrence*, 2000 WL 49461 (**4th Cir.** 2000), reiterated **Fourth Circuit** methodology for criminal history departures. A sentencing court can depart to the next higher category and move on to a still higher category only upon a finding that the previous category failed adequately to reflect the seriousness of the defendant's record. If the court gets to level VI and still finds the sentencing options insufficient, the district court may depart to the guideline range applicable to career offenders similar to the defendant if defendant's prior criminal record is sufficiently serious to conclude that he should be treated as a career offender. *See also United States v. Boe*, 117 F.3d 830 (**5th Cir.** 1997) (reversed and remanded upward departure to Category VI to reflect seriousness of defendant's past conduct without district court first considering intermediate categories required to justify Category VI Range).
- ***Criminal History Category Did Not Adequately Reflect Seriousness of Offense.***
 - S** *United States v. Gallagher*, 223 F.3d 511 (**7th Cir.** 2000), affirmed an upward departure from criminal history category V to VI based on findings that arson defendant's criminal history category did not adequately reflect defendant's commission of an uncharged murder, and other past uncharged crimes. The court agreed with the district court's findings that, based on a preponderance of the evidence, the defendant had multiple motives for committing the murder and was the only suspect with the opportunity to commit the crime. The evidence further supported the upward departure as more accurately reflecting defendant's true criminal history.
 - S** *United States v. Herr*, 202 F.3d 1014 (**8th Cir.** 2000), held that the district court did not abuse its discretion by departing upward for purposes of deterrence based on the defendant's prior dissimilar convictions, even though prior convictions were not sufficiently as serious as the instant offense. The defendant's repeated violations, including convictions for failure to appear and resisting arrest, showed the defendant's disrespect for the law and provided support that leniency towards the defendant had not been effective.
- ***Armed Career Criminal Status Overrepresents Seriousness of Criminal History.*** *United States v. Ruckers*, 171 F.3d 1359 (**11th Cir.**), *cert. denied*, 120 S. Ct. 426 (1999), reversed a downward departure made on the grounds that the defendant's prior convictions fell within the statutory definition of serious drug offenses but only involved small amounts of drugs and therefore were "very minor." The court noted that the defendant's prior state convictions for possession with intent to distribute cocaine constituted serious drug offenses within the meaning of 18 U.S.C. § 924(e)(2)(A)(ii) and, therefore, the defendant fell within the §4B1.4 Armed Career Offender Guideline. The court of appeals rejected the departure downward reasoning that a sentencing court may not look behind the facts of a prior conviction to conclude whether a downward departure is

warranted on the grounds that the offense involved only a small amount of drugs and therefore was not serious.

- ***Uncounted Foreign Convictions.*** *United States v. Fordham*, 187 F.3d 344 (3d Cir. 1999), affirmed an upward departure based on the defendant's foreign conviction which was not counted in criminal history. The district court found that the defendant's Criminal History Category I significantly underrepresented the seriousness of the defendant's criminal history and departed to category II based on the uncounted foreign conviction. The appellate court concluded that the district court was within its discretion to hold that the foreign conviction was fair and upheld the departure.
- ***Subsequently Dismissed Charges.*** *United States v. Millsaps*, 157 F.3d 989 (5th Cir. 1998), held that an upward departure based on charges in the superseding indictment that were subsequently dismissed did not violate due process. The court relied on an earlier decision, *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1969 (1995), in which it stated that §4A1.3 expressly authorizes the Court to consider "prior adult criminal conduct not resulting in a conviction."
- ***Commission of Additional Offenses While on Supervised Release.*** *United States v. King*, 150 F.3d 644 (7th Cir. 1998), approved an upward departure under §4A1.3 for the commission of five bank robberies while on supervised release from earlier conviction for bank robbery.
- ***Excessive Number of Criminal History Points.*** *United States v. Melgar-Galvez*, 161 F.3d 1122 (7th Cir. 1998), upheld a 1-level upward departure based on district court's belief that defendant's excess number of criminal history points (18) was not adequately reflected in his assigned criminal history category.
- ***Similar Prior Conviction Not Adequately Considered.*** *United States v. Ward*, 131 F.3d 335 (3d Cir. 1997), affirmed an upward departure based on a prior sexual assault for a defendant being sentenced for kidnapping and sexual assault. The prior similar conviction was not adequately considered in the defendant's criminal history because the difference between a conviction for an offense resulting in a term of imprisonment of more than one year and a conviction for a prior sexual assault was not taken into account.

SUBSTANTIAL ASSISTANCE (§5K1.1)⁷

⁷A more extensive analysis of departures under §5K1.1 is provided in USSC's publication "Substantial Assistance Departures" Case Law.

Substantial assistance is a recognized ground for departure under §5K1.1 upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

- ***Substantial Assistance in the Absence of Government Motion.*** *United States v. Solis*, 169 F.3d 224 (5th Cir. 1999), reversed the downward departure that was based on the defendant's substantial assistance where the government filed no motion. The court held that §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a Government motion. *See also United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 1479 (1999) (held that the district court does not have the authority, under §5K2.0, to grant a downward departure based on the defendant's substantial assistance in the absence of a government motion under §5K1.1).

S *United States v. Cruz-Guerrero*, 194 F.3d 1029, 1031 (9th Cir. 1999), reversed the downward departure that was based on substantial assistance to the government where the government had not moved for such departure. The court relied on the governing guideline regarding departures for substantial assistance, §5K1.1. Section 5K1.1 requires a motion to be filed by the government for consideration of the defendant's substantial assistance. The court reinforced its interpretation of §5K1.1 to mean that, in the absence of arbitrariness or unconstitutional motivation on the part of the government, a district court may not depart downward from the guidelines for substantial assistance unless the government moved for such a departure.

C. DISCOURAGED FACTORS

The Commission has determined that the following specific offender characteristics are not ordinarily relevant to the determination of whether a departure should be granted, but may be relevant in "extraordinary" or "exceptional" cases: Sections 5H1.1 (Age), 5H1.2 (Education and Vocational Skills), 5H1.3 (Mental and Emotional Conditions), 5H1.4 (Physical Condition, Including Drug and Alcohol Dependence or Abuse), 5H1.5 (Employment Record); 5H1.6 (Family Ties and Responsibilities and Community Ties), 5H1.11 (Military, Civic, Charitable, or Public Service; Employee-Related Contributions; Record of Prior Good Works), and 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances). In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.

- **Age (§5H1.1).** *United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), *cert. denied*, 118 S. Ct. 1855 (1998), upheld a district court's decision that it lacked authority to depart based in part on the defendant's age, 67, absent some extraordinary infirmity.

- **Physical Condition, Including Drug or Alcohol Dependence or Abuse (§5H1.4).**

S *Defendant's Deafness.* *United States v. Russell*, 156 F.3d 687 (**6th Cir.** 1998), held that the defendant's deafness did not qualify him for downward departure under the guidelines for extraordinary physical impairment where the defendant did not allege that prison services were inadequate to accommodate his disability or that he was not protected against attackers.

S *Defendant's Drug Addiction.* *United States v. Webb*, 134 F.3d 403 (**D.C. Cir.**), *on remand to* 1998 WL 93052 (1998), held that the defendant's drug addiction could not form a basis for downward departure. The district court identified the defendant's drug addiction as the "principal mitigating circumstance" that took the case outside the heartland of the guideline for drug distribution. The court, in applying the *Koon* analysis, stated that drug dependency or use was a *forbidden* departure under the guidelines and should not have been granted. The defendant pled guilty to distribution of more than 50 grams of crack cocaine in a single transaction, not to a small-time purchase or possession. That single transaction placed the defendant within the "heartland" of distribution cases for 50 grams of more of crack cocaine.

- **Employment Record (§5H1.5).** *United States v. Jones*, 158 F.3d 492 (**10th Cir.** 1998), upheld a downward departure based in part of the defendant's long-term work history in an economically depressed area with few employment opportunities as well as on the adverse impact incarceration would have on his future employment prospects, in light of the community in which he lives. The court noted that the Supreme Court in *Koon* okayed consideration of collateral employment consequences. "A factor may be considered in the aggregate if it is 'atypical' even though it may not be sufficient, in and of itself, to support a departure.

- **Family Ties and Responsibilities and Community Ties (§5H1.6).**

S *Family Ties.* *United States v. Sweeting*, 213 F.3d 95 (**3d Cir.** 2000), reversed a 12-level downward departure based on defendant's single parent status and the adverse effect defendant's incarceration would have on disrupting the family unit and its effect on the oldest child afflicted with a neurological disorder. Disruptions of the defendant's life and concomitant difficulties for those who depend on the defendant, are inherent in the punishment of the incarceration. The court further noted that defendant's status as a single parent does not meet the threshold of "extraordinary" when compared to innumerable cases in which single parents commit crimes. *See also United States v. Sprei*, 145 F.3d 528 (**2d Cir.** 1998) (reversed a downward departure based on the unique responsibility the defendant, as a Hasidic Jew, bore for his children's desirability as marriage partners because of his incarceration); *United States v. Wilson*, 114 F.3d 429 (**4th Cir.** 1997) (reversed a downward departure based on family ties due to defendant's decision to keep the out-of-wedlock baby he fathered).

S ***Family Circumstances.*** *United States v. Wright*, 218 F.3d 812 (**7th Cir.** 2000), vacated a downward departure based on the adverse effect the loss of a remaining parent to imprisonment will have on defendant's children. The court noted that reducing a sentence to assist a child's development makes most sense when the range is low to begin with and a small departure allows the parent to provide continuing care. The court concluded that a downward departure for extraordinary family circumstances cannot be justified when, even after reduction, the sentence is so long that release will come too late to promote the child's welfare. *See also United States v. Faria*, 161 F.3d 761 (**2d Cir.** 1998) (vacated a downward departure based on the hardship defendant's incarceration would have on the children); *United States v. Archuleta*, 128 F.3d 1446 (**10th Cir.** 1997) (reversed a downward departure for family circumstances where there was no one but the defendant, a single parent, to care for his two children and his diabetic mother).

S ***Extraordinary Family Circumstances.*** *United States v. Owens*, 145 F.3d 923 (**7th Cir.** 1998), held that it was not error to depart downward for extraordinary family circumstances where the defendant's common-law wife and children would have to go on public assistance; while the case was not the most compelling for departure, the court of appeals refused to second-guess the district court's decision.

- **Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (§5H1.11).**

S ***Exceptional Civic Involvement.*** *United States v. Crouse*, 145 F.3d 786 (**6th Cir.** 1998), held that the defendant's exceptional civic involvement was sufficient to take the case out of the heartland of white collar offenders.

S ***Extensive Charitable Activities.*** *United States v. Woods*, 159 F.3d 1132 (**8th Cir.** 1998), upheld a 1-level downward departure for the defendant's extensive charitable activities: the defendant brought two troubled young women into her home, including a former employee who had stolen from her, and paid for them to attend private high school. Both women became productive members of society. The defendant also assisted an elderly friend to move from a nursing home to an apartment and helped care for him so that he could live out his remaining years with greater independence.

D. UNMENTIONED FACTORS (§5K2.0)

Pursuant to §5K2.0 any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Such "unmentioned factors" are factors which have no semantic or practical equivalent or substitute in the guidelines and no

mentioned factor addresses it. The courts have reversed or affirmed departures based on a number of unmentioned factors:

- ***Alienage.*** *United States v. Garay*, 235 F.3d 230 (5th Cir., 2000), upheld the district court's refusal to depart downward on the basis of defendant's alienage. The district court stated that there was nothing "atypical" about defendant's case that would take it outside the "heartland" of immigration cases to which the guideline applied. The cases upon which defendant relied were noted by the court of appeals as cases which involved aliens convicted of crimes other than immigration cases. The court determined that defendant's status as a deportable alien, as an inherent element of his crime, has already been considered by the Commission in formulating the applicable guideline.
- ***Extraordinary Physical Impairment.*** *United States v. Albarran*, 233 F.3d 972 (7th Cir. 2000), upheld the district court's refusal to depart downward on the basis of defendant's extraordinary physical impairment related to his heart condition. The district court when considering a departure based upon a physical impairment "must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated. Defendant presented no such evidence at the sentencing hearing. The court of appeals concluded that it would have been inappropriate for the district court to grant a departure on this basis without sufficient evidence.
- ***Inadequate Notice for Departure.*** *United States v. Morris*, 204 F.3d 776 (7th Cir. 2000), reversed an upward departure based on the district court's assessment that a presentence report that referred only to the guideline was sufficient notice to defendant of departure from the guidelines range. The court held that unless the PSR refers not only to the guideline but also to the rationale for the departure and the facts that support this theory of departure, referring to the a specific guideline alone is inadequate.
- ***Status of the Sentencing Commission.*** *United States v. Martin*, 221 F.3d 52 (1st Cir. 2000), vacated a sentence imposed by the district court in which it erroneously granted a downward departure based on the moribund status of the Sentencing Commission, together with the perceived disparity between the defendant's sentencing range and the national median sentence for persons convicted of federal drug-trafficking. The court of appeals noted that neither element, singularly or in combination, could carry the weight of a downward departure. It further stated that sentencing guidelines, once promulgated, have the force of law and that stands even when the Commission is empty.
- ***Offenses Charged in Indictment Without Jury Verdict Being Reached.*** *United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999), upheld an upward departure based on the district court's finding, by clear and convincing evidence, that the defendant participated in three robberies that had

been charged in the indictment but as to which the jury was unable to reach a verdict. *But see Apprendi v. New Jersey*, 120 S. Ct. 2348 (June 26, 2000).

- ***Substantial, Voluntary Restitution.*** *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999), held that departing downward on the basis of the defendant's extraordinary efforts at restitution was not an abuse of discretion. Upon the bank's discovery of the defendant's misrepresentation of assets claimed in order to secure a bank loan, the defendant began liquidating assets owned, pledged or unpledged, in order to repay the bank. Over a one-year period, the defendant repaid the bank most of the money owed while simultaneously and substantially reducing the bank's loss amount from over \$800,000 to less than \$60,000. The court noted that the defendant voluntarily began making restitution almost a year before he was indicted and the restitution paid nearly 94 percent of that owed to the bank. In such case the court held the defendant's substantial voluntary restitution was "extraordinary" and appropriate as a basis for a downward departure.
- ***Presentence Rehabilitation.*** *United States v. Craven*, 2000 WL 87573 (1st Cir., Feb. 6, 2001), annulled a downward departure for extraordinary presentence rehabilitation and remanded defendant's case for re-sentencing. Defendant disavowed drug and alcohol abuse approximately one year before his arrest but during his pretrial detention incurred numerous disciplinary infractions. The district court granted a downward departure by relying on an expert opinion the court solicited ex parte. Based on that opinion, the district court found that the proliferation of disciplinary violations did not undercut defendant's eligibility for a downward departure based on his supposed extraordinary rehabilitation. The Sixth Circuit determined that a sentencing court may not use an ex parte conversation with a court-appointed expert as a means to acquire information critical to a sentencing determination. The court concluded that the district court's violation of this principle tainted the factual basis for the departure decision and annulled defendant's downward departure for extraordinary presentence rehabilitation.
- ***Post-Offense Rehabilitation.***⁸
 - S *United States v. Bryson*, 163 F.3d 742 (2d Cir. 1998), vacated a downward departure based on post-offense rehabilitation where the evidence was insufficient to support a conclusion that rehabilitation had taken place and district court had only vaguely stated its findings on rehabilitation while expressing dissatisfaction with the guideline range.
 - S *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998), held that, under *Koon*, post-offense rehabilitation is a proper basis for departure upon resentencing. Consistent with the

⁸The new policy statement, §5K2.19, does not apply to post-offense rehabilitation efforts that occur before the original sentencing.

Second, Third, and District of Columbia Circuits, the court found that the defendant's post-sentencing efforts were sufficiently "extraordinary" and "exceptional" to take the case outside of the "heartland." The defendant's voluntary efforts in community service by assisting needy and deprived youth was "exemplary." The defendant's availability for daily tutoring, computer training programs and special events was "above and beyond" atypical post-sentencing efforts. While the defendant was required to do community service, there was no requirement to become actively engaged in that experience.

- S** *United States v. Whitaker*, 152 F.3d 1238 (**10th Cir.** 1998), held that post-offense drug rehabilitation can form the basis for departure, effectively overruling prior circuit precedent to the contrary. The court found that although addiction and abuse are typically forbidden as a basis for departure, this does not preclude consideration of post-offense drug rehabilitation efforts. These efforts are to be evaluated by the same standards as a defendant's efforts at any other form of rehabilitation. Other cases to consider are *United States v. Core*, 125 F.3d 74 (**2d Cir.** 1997), *cert. denied*, 118 S.Ct. 735 (1998); *United States v. Rhodes*, 145 F.3d 1375 (**D.C. Cir.** 1998); *United States v. Sally*, 116 F.3d 76 (**3d Cir.** 1997); *United States v. Brock*, 108 F.3d 31 (**4th Cir.** 1997); and *United States v. Kapitzke*, 130 F.3d 820 (**8th Cir.** 1997).
- ***Threatened Communications.*** *United States v. Adelman*, 168 F.3d 84 (**2d Cir.** 1999), upheld an upward departure based on the fact that the defendant's threatening communications affected people other than the direct victim, a situation not provided for in the offense guideline §2A6.1. The defendant not only made threats to a judge but also indicated in one of the threatening phone messages that the judge's "kid" was held captive. Since the judge had three children, the court agreed that it was properly found that all three children were victims of the threatening behavior. The court determined that since the sentencing guideline do not account for multiple victims under §2A6.1, an upward departure was warranted.
 - ***Monetary Loss Overstates Gravity of Offense.*** *United States v. Brennick*, 134 F.3d 10 (**1st Cir.** 1998), vacated a downward departure predicated on the monetary loss overstating the gravity of the offense. The appellate court noted that the defendant's intention to repay may remove his case from the heartland of tax evasion, but questioned the appropriateness of the district court's borrowing from the fraud guidelines the concept of monetary loss overstating culpability. The court of appeals remanded, stating that the factors weighing against any departure, and certainly one of this degree, from a minimum of 41 months down to 13 months, received inadequate attention in the district court's opinion.
 - ***Inducement of Parolees to Commit Crack Cocaine Offenses.*** *United States v. Coleman*, 188 F.3d 354 (**6th Cir.**), *vacated*, 138 F.3d 616 (**6th Cir.** 1998), held that the district court should have considered whether a downward departure was warranted based on the government's

alleged improper targeting and inducement of African American parolees to commit crack cocaine offenses.

- **Government's Conduct.** *United States v. Basalo*, 109 F. Supp. 2d. 1219, (N.D. Cal. 2000), held that government misconduct warranted an 8-level downward departure. The government's failure to disclose information regarding the participation of government witnesses in an incentive program at the Customs Service coupled with the defendant's former counsel's unethical and incompetent defense led to this departure.
- S *United States v. Jones*, 160 F.3d 473 (8th Cir. 1998), remanded for consideration of a downward departure based on the fact that the government's conduct in reducing the sentences of more culpable coconspirators who testified (and being "less than forthright with the jury" about the arrangements) may have prejudiced the defendants. *See also United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998) (reversed and remanded downward departure based on undercover agent's sexual misconduct with the defendant during the investigation); *United States v. Santoyo*, 146 F.3d. 519, 525-526 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1085 (1999) (court affirmed that the extent of the alleged "cajoling" was not so unique as to remove this case from the heartland of drug offenses).
- S **Cultural Assimilation.** *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998), upheld, as a ground for departure, for an illegal reentry defendant, the defendant's "cultural assimilation." The defendant's 23 years of legal residence in the United States (since age 12), his marriage to a United States citizen, and five children who were United States citizens provided significant cultural ties to the United States that made his motivation for illegal reentry or continued presence different from the typical economic motivation. The court noted that it may lessen a defendant's culpability that his motivation is familial or cultural rather than economic.
- S **Defendant's Lost Opportunity to Serve State Sentence Concurrently with Federal Sentence.** *United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (*en banc*), held that the district court could properly depart based on the fact that, because of the delay in indicting and sentencing the defendant on the federal charge, the defendant lost the opportunity to serve ten months or more of his state sentence concurrently with his federal sentence.
- S **Murder-for-Hire Conspiracies.** *United States v. Scott*, 145 F.3d 878 (10th Cir. 1998), upheld a 2-level departure based on the fact that the defendant commenced two separate murder-for-hire conspiracies against a single victim.
- S **Egregious Behavior.** *United States v. Nevels*, 160 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1130 (1999), upheld a 7-level upward departure based on egregious behavior. The district court found that the defendant's behavior was especially egregious because he participated in a check-cashing scheme using stolen social security checks.

See also United States v. Arce, 118 F.3d 335 (**5th Cir.** 1997), *cert. denied*, 118 S. Ct. 705 (1998) (affirmed upward departure based on defendant's concealment of illegal activities); *United States v. Meacham*, 115 F.3d 1488 (**10th Cir.** 1997) (reversed and remanded downward departure based on victim's lack of physical or psychological harm); *United States v. Atkins*, 116 F.3d 1566 (**D.C. Cir.**), *cert. denied*, 118 S. Ct. 430 (1997) (reversed and remanded downward departure based on finding that defendant was not a threat to public safety).

Unmentioned Factors Considered by Courts to Take the Case Outside the “Heartland”

- S ***History of Child Abuse.*** *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000), reversed a downward departure based on defendant’s history of not abusing any child, of not having an inclination, predisposition, or tendency to do so, and the fact that the defendant had not produced or distributed child pornography, with no inclination, predisposition, or tendency to do so. The court ruled that this factor did not suffice to take the defendant’s case out of the “heartland” of §2G2.4. **Consistent with the Second, Eighth, and Ninth Circuits**, the court stated that the guidelines had taken into account the varying degrees of the severity of offenses involving possession of child pornography as compared to more serious forms of exploitation. The court held that the guidelines clearly reflect in §§2G2.1-2G2.4 consideration of whether, and the degree to which, harm to minors is or has been involved.
- S ***Failure to Engage in Wrongful Conduct.*** *United States v. Stevens*, 197 F.3d 1263, 1268-70 (9th Cir. 1999), held that the determination of whether the defendant’s conduct fell within the heartland of the guideline for possession of child pornography required a comparison of the defendant’s conduct with that of other offenders. The court reasoned that the defendant’s substantial number of “old” images of child pornography was typical of heartland cases under §2G2.4. **Consistent with the Second and Eighth Circuits**, the court held that the defendant’s failure to engage in additional wrongful conduct is impermissible as a grounds for departure when sentencing for crime of possession of child pornography. The court further held that the use of a computer is equally inappropriate to prove the defendant as less culpable when the same factor is provided as a sentencing *enhancement* under §2G2.4.
- S ***Cultural Differences.*** *United States v. Tomono*, 143 F.3d 1401, 1404 (11th Cir. 1998), held that the district court erred in departing downward based on “cultural differences” arising from the defendant’s illegal importation of turtles and snakes from Japan. The court noted that the defendant was aware of the United States regulations forbidding the importation of reptiles, and yet, with this understanding, falsely completed the Customs forms to indicate that the defendant was not bringing into the United States any more live animals. The court examined the record of evidence and held: (1) Reptiles do not occupy a “unique” place in Japanese culture so as to warrant a downward departure for cultural differences; and (2) The circumstances surrounding the defendant’s crime were not very different from the “heartland” of cases considered by the Sentencing Commission in drafting §2Q2.1.
- S ***Application of Cross-Reference.*** *United States v. Fenner*, 147 F.3d 360, 363-364 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 568 (1998), reversed a downward departure based on a significant increase in sentencing guideline ranges due to the application of a cross-reference provision that applies to firearms offenses resulting in death. Such factor did not take the case outside the “heartland” of cases under §2K2.1. This language indicated that the guidelines had taken into account that application of §2K2.1(c)(1)(B) cross-reference will result in an enhanced guideline range and consequently does not take the case outside of the “heartland.”

- S ***Impulse Control Disorder.*** *United States v. Miller*, 146 F.3d 1281, 1285-1286 (**11th Cir.** 1998), held that the defendant’s impulse control disorder did not take case outside the heartland of cases involving sexual exploitation of minors. The defendant’s impulse control disorder was related to viewing adult pornography and acting out sexually with adults. The impulse was related to viewing pornography but was not related to the *means* of obtaining the pornography (*i.e.*, trading of child pornography via the Internet). The defendant used the pornographic pictures of children to solicit the kind of pictures of interest to the defendant. Because there was nothing unusual about the defendant or the facts of this case, the court affirmed that the case fell within the heartland of case regulated by the sentencing guideline.

E. INVALID *PER SE* FACTORS

Pursuant to §5K2.0, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range, if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guideline is inadequate or excessive. Such factors characterized as “invalid per se” have been taken into consideration within the structure of the Sentencing Guidelines Manual but not *always* specifically addressed in a given guideline.

- ***Adverse Civil Judgment.*** *United States v. Pennington*, 168 F.3d 1060 (**8th Cir.** 1999), upheld the district court’s refusal to depart downward based on the fraud victim’s receipt of a \$6,000,000 judgment in its civil fraud action against the defendant for the conduct at issue in the criminal case. The court concluded that an adverse judgment in a prior civil case involving the same fraudulent conduct is not a permissible basis to reduce the prison sentence for the criminal fraud. It is entirely foreseeable that fraud victims will seek to recover their damages in civil actions against fraud perpetrators; thus an adverse civil judgment does not warrant a downward departure because it does not take a fraud case out of the heartland of §2F1.1.
- ***Defendant’s Mistake of Fact.*** *United States v. Rodriguez-Ochoa*, 169 F.3d 529 (**8th Cir.** 1999), upheld the district court’s refusal to depart downward based on the defendants’ mistake of fact where they contended they believed they were transporting a different type of drug. The court of appeals held that the guidelines explicitly consider the effect of a drug defendant’s mistake of fact on his or her sentencing accountability in §1B1.3, comment. (n.2(a)(1)), and the district court could not depart on that basis.
- ***Sentencing Disparity.*** *United States v. Banuelos*, 215 F.3d 969 (**9th Cir.** 2000), upheld the district court’s refusal to depart downward on the basis of sentencing disparities arising from charging and plea bargaining decisions of different United States Attorneys. The government argued that it was appropriate for the district court to depart upward to equalize the sentences of the defendant and his co-defendant, because they had engaged in similar underlying criminal conduct. The court of appeals held that the district court could not impose an upward departure to equalize the defendant’s sentence with that of his co-defendant, because the two defendants had not “pled guilty to essentially the same crime.” *See also United States v. Contreras*, 180 F.3d 1204 (**10th Cir.**), *cert. denied*, 120 S. Ct. 243 (1999) (reversed a downward departure based on sentencing

disparity between codefendants); *United States v. Snyder*, 136 F.3d 65 (1st Cir. 1998) (held that disparity between federal and state sentencing is a forbidden departure factor); *United States v. Searcy*, 132 F.3d 1421 (11th Cir. 1998) (same).

- ***Defendant's Susceptibility to Abuse in Prison Based on the Nature of Offense.*** *United States v. Wilke*, 156 F.3d 749 (7th Cir. 1998), reversed a downward departure for a defendant convicted of child pornography offense based on susceptibility to abuse in prison. A court may not rely on the nature of defendant's offense as a factor justifying such a departure, although the court could consider the defendant's sexual orientation and demeanor.
- ***Voluntary Deportation.*** *United States v. Galvez-Falconi*, 174 F.3d 255 (2d Cir. 1999), reversed and remanded a departure for the district court to consider defendant's "colorable, non-frivolous consent to deportation" as a basis for a downward departure. The court stated that defendant's consent to deportation, in the absence of government's consent would substantially assist in the administration of justice enough to warrant a downward departure. *See also United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), *cert. denied*, 118 S. Ct. 1855 (1998) (upheld district court's decision not to depart downward based on defendant's mere consent to deportation without a request from the government).
- ***Money Laundering Minimal Part of Overall Offense Conduct.*** *United States v. Threadgill*, 172 F.3d 357 (5th Cir.), *cert denied*, 120 S. Ct. 172 (1999), affirmed downward departure (reducing sentences from between 40 percent to 75 percent of presumptive range) based on the fact that the defendants' money laundering activities "were incidental to the gambling operation" (laundered only \$500,000 of \$20,000,000 in gross wagers) and that the "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities"; in the process the **Fifth Circuit** expressly abrogates *United States v. Willey*, 57 F.3d 1374 (5th Cir.), *cert. denied*, 516 U.S. 1029 (1995) (departure cannot be justified on finding that the subject crime was "disproportionately a small part of the overall criminal conduct") in light of *Koon*.
- ***Conduct Not Typical Money Laundering Conduct.*** *United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998). The **Fifth Circuit** held that the district court did not abuse its discretion when it determined that the defendant's offenses did not fall within the heartland of the money laundering guideline, and instead departed downward by applying the fraud guideline which resulted in lower sentencing range. The district court determined that money laundering guideline primarily targets large-scale money laundering, while the present case involved use of conduit to conceal the fact that corporate funds were infused into a political campaign.
- ***Endangering Victims.*** *United States v. Johnson*, 152 F.3d 553 (6th Cir. 1998), reversed an upward departure based on the defendant's setting fire to an automobile at the entrance of a church under the heating and cooling unit, thereby endangering the firefighters who had to use this entrance. This factor was invalid because there were other entrances to the church and the circumstances of the fire were well within the heartland of cases. Nor were the defendant's racist motives in setting

the fire proper bases for departure since they were already accounted for by an enhancement under §3A1.1(a).

- ***Exemplary Behavior Pending Appeals.*** *United States v. Crouse*, 145 F.3d 786 (**6th Cir.** 1998), reversed district court's finding that the defendant's exemplary behavior during the pendency of appeals warranted a downward departure. The court noted that the defendant, convicted of interstate commerce shipment of adulterated orange juice, was granted downward departure because the defendant had "satisfactorily complied" with all the terms of home confinement and was a "model probationer." The court found that it is expected that a person sentenced to home confinement, or any other punishment, will "satisfactorily comply" with the terms of the sentence, or otherwise suffer the consequences of non-compliance. To reward the defendant for following the law is not a permissible grounds for departure.
- ***Inadequate Additional Punishment.*** *United States v. G.L.*, 143 F.3d 1249 (**9th Cir.** 1998), reversed an upward departure based on inadequate punishment which resulted from the district court grouping three auto theft convictions. The court recommended that the correct course of action is "a sentence in the upper regions of the guideline range rather than a departure."
- ***Uncredited Time Served in State Custody.*** *United States v. Montez-Gaviria*, 163 F.3d 697 (**2d Cir.** 1998), reversed and remanded case to allow the district court to consider, as a grounds for departure, the incarceration period of an alien that was solely due to the federal government's delay in transferring the alien to federal custody. The court determined that this was a valid ground for departing in order to compensate for the uncredited time of confinement in state custody on a detainer lodged by the INS prior to the defendant's conviction. *But see United States v. Saldana*, 109 F.3d 100 (**1st Cir.** 1997) (reversed and remanded downward departure based on government's delay in prosecuting re-entry conviction); *United States v. McHan*, 101 F.3d 1027 (**4th Cir.** 1996), *cert. denied*, 520 U.S. 1281 (1997) (reversed and remanded downward departure based on credit given for defendant's discharged sentences when, under §5G1.3, the Sentencing Commission has clearly denied giving the sentencing judge the authority to grant defendant credit for the same).

F. COMBINATION OF FACTORS — §5K2.0, Comment.

- *United States v. Lewis*, 235 F.3d 394 (**8th Cir.** 2000), affirmed an upward departure on account of extreme psychological injury (§5K2.3), unlawful restraint (§5K2.4), and extreme conduct (§5K2.8) involved in defendant's case in which he was convicted of conspiring to harbor and illegal alien and for harboring an illegal alien.. Defendant held captive an illegal alien, forcing him to work as a servant in defendant's household. The illegal alien was repeatedly physically beaten, tormented, sexually abused, and deprived of nourishment and medical care until his death, when he was buried in the backyard of defendant's home.
- *United States v. Iannone*, 184 F.3d 214 (**3d Cir.** 1999), affirmed an upward departure based on (1) the defendant masqueraded as a decorated Vietnam combat veteran, a person in witness

protection program, and a government agent on a secret mission; (2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; (3) his attempt to conceal his fraud by faking his own death; (4) his fabricated story about his family having been killed by a drunk driver; and (5) severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case unusual and justified a 2-level departure. *See also United States v. Cornielle*, 171 F.3d 748 (**2d Cir.** 1999).

- *United States v. Debeir*, 186 F.3d 561 (**4th Cir.** 1999), reversed a downward departure that was based on a combination of factors such as the defendant's unique psychological condition and unusual susceptibility to abuse in prison; the defendant's alien status and employment consequences; the defendant's exposure to negative publicity; the victimless nature of the defendant's offense; and the fact that the defendant was not a pedophile. The court found that neither individually, nor in combination, were the circumstances, characteristics or consequences of this case so unique or extraordinary to bring it outside the heartland of cases sentenced under the guidelines.
- *United States v. Reed*, 167 F.3d 984 (**6th Cir.**), *cert. denied*, 120 S. Ct. 229 (1999), reversed a downward departure based in part on the district court's assessment that the defendant's conduct was on the outer edges of that contemplated by the money laundering statutes and, in part, on the time and cost involved in her interlocutory appeal. Although holding Reed less culpable than the typical money launderer, the district court provided no specifics and offered no factors not contemplated by the guidelines. Further, although delay, costs, and the toll that a delay takes on a defendant certainly may represent legitimate bases for a departure, the court of appeals stated that neither the district judge nor the defendant provided any evidence that the length of the delay or the costs involved in the appeal were unusual; in fact, the defendant remained free on bond during the entire process.
- *United States v. Winters*, 174 F.3d 478 (**5th Cir.**), *cert. denied*, 120 S. Ct. 409 (1999), reversed a downward departure based on susceptibility to abuse in prison for a state corrections officer convicted of several offenses growing out of his pistol-whipping of a handcuffed prisoner. The officer faced a mandatory 60-month term for the firearm offense, in addition to 108 to 135 months on his civil rights and obstruction of justice convictions. The district court's original basis for departure, "aberrant behavior," was rejected by the **Fifth Circuit**. The district court then departed downward on the grounds that his status as an officer made him especially susceptible to abuse in prison and that the guidelines sentence, which included a mandatory minimum term for the use of a firearm, was too harsh. Once again, the **Fifth Circuit** reversed the downward departures. No other factors existed that made the defendant more susceptible to abuse in prison than any other convicted corrections officer. Because the district court articulated no adequate departure factors and based the departure only on its preference for what the sentence should be, the case was remanded for re-sentencing without the benefit of the departures.
- *United States v. Payton*, 159 F.3d 49 (**2d Cir.** 1998), reversed a downward departure based on a combination of factors: two (lack of positive male role model and history of drug abuse and failed treatment) were determined to be invalid bases for departure, and the court was mistaken about a

third reason, the defendant's ineligibility for credit for his pre-trial detention when in fact the defendant received credit. The sentencing court also noted that a fourth factor, the defendant's learning disability and loss of educational opportunities, was inadequate, standing alone, to support a departure.

See also United States v. Drew, 131 F.3d 1269 (**8th Cir.** 1997) (reversed a downward departure for a defendant convicted of receiving child pornography based on the defendant's high intelligence, disruption of education, employment consequences, and susceptibility of abuse in prison); *United States v. Sablan*, 114 F.3d 913 (**9th Cir.** 1997), *cert. denied*, 522 U.S. 1075 (1998) (affirmed an upward departure based on significant personal injury and property damage); *United States v. Gallegos*, 129 F.3d 1140 (**10th Cir.** 1997) (reversed a departure based on a combination of disparity in sentences between the defendant and her codefendants, the defendant's minor role, coercion, lack of criminal history, and family responsibilities).

VI. EXTENT OF DEPARTURES

18 U.S.C. § 3742(f)

If the reviewing court concludes that the decision to depart was not the result of an erroneous interpretation of the guidelines, it must then determine whether the resulting sentence outside the guideline range is unreasonable. If the court does not find the extent of the departure unreasonable, it must affirm the sentence.

For example, in *Williams v. United States*, 503 U.S. 193 (1992), the U.S. Supreme Court held that a reviewing court may, in appropriate circumstances, affirm a sentence in which a district court's departure from a guideline range is based on both valid and invalid factors. In *Williams*, the district court departed upward from an 18 to 24 months guideline range and sentenced defendant to 27 months' imprisonment determining that his criminal history was inadequate because it did not include two convictions that were too old to be counted in the Guidelines' criminal history calculation and because it did not reflect several prior arrests. On appeal the court agreed that the prior convictions were reliable information as a grounds for departure, but rejected the district court's reliance upon the prior arrests because the Guidelines prohibited basing a departure on a prior arrest record alone. Although the district court had used both proper and improper factors to justify departure, the court affirmed the sentence on the ground that it was reasonable in light of the proper factors standing alone, pursuant to 18 U.S.C. § 3742(f)(2).

Guidelines

The guidelines contemplate two kinds of departures, guided and unguided. In the first, the guidelines provide policy guidance for departure by analogy or by suggestions. *See* USSG Ch. 1, Pt. A(4), *intro. comment*. The Commission has stated its view that most departures will reflect the suggestions and that the courts of appeal will be more likely to find departures unreasonable where they fall outside suggested levels. *Id.* Unguided departures may be for grounds mentioned in Chapter Five, Part K, or on grounds not mentioned in the guidelines.

Departures driven by considerations of criminal history categories are sometimes referred to as horizontal departures, because they move along the horizontal axis of the Sentencing Table. Similarly, departures to higher or lower offense levels are referred to as vertical departures.

Prior to *Koon*, the **Ninth Circuit** required that the extent of an upward departure requires a comparison to analogous guideline provisions. *United States v. Lira-Barraza*, 941 F.2d 745 (**9th Cir.** 1991) (*en banc*). In *United States v. Sablan*, 114 F.3d 913 (**9th Cir.** 1997), *cert. denied*, 118 S. Ct. 851 (1998), however, the court stated its belief that the unitary abuse of discretion standard announced for analyzing the propriety of departures in *Koon* applies equally to an analysis of the extent of departures. The court rejected the analogous approach as “mechanistic” and held that where a district court sets out findings justifying the magnitude of its decision to depart and the extent of departure from the guidelines and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. 114 F.3d at 919. However, the court added that the district courts are not prohibited from considering the possible relevancy of analogous guidelines. An analysis and explanation by analogy may still be useful in determining and explaining the extent of departure, but is no longer essential. 114 F.3d at 919 n.10.

For example, in *United States v. Matthews*, 120 F.3d 185 (**9th Cir.** 1997), the district court made an upward departure in sentencing a defendant who placed a bomb that injured a third party, based on the substantial risk of death or serious injury to more than one person. The **Ninth Circuit** found the extent of the departure unreasonable, in that it exceeded the sentence the defendant could have received had he been convicted of the offenses the district court analogized to in order to set the departure. Where a guideline is used by analogy as approximating the defendant’s conduct, the reasonableness of the departure is evaluated by treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it.

In *United States v. Roston*, 168 F.3d 377 (**9th Cir.**), *cert. denied*, 120 S. Ct. 11 (1999), the **Ninth Circuit** approved a 7-level upward departure for extreme conduct where the defendant was convicted of second-degree murder for killing his wife on their honeymoon. The court noted that, although such a departure is substantial, the district court was well-positioned to determine if the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases. “It is appropriate to defer to the district court’s assessment in this case.” Following *Sablan*, the court emphasized that where a district court sets out findings justifying the magnitude and extent of its departure from the guidelines, and the explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. In this case, the court of appeals held that the resulting 405-month term of incarceration “is not an unreasonable punishment for a man who killed his wife in such a barbaric manner.”

Where courts have granted the government’s motion to depart below the statutorily required minimum because of defendant’s substantial assistance, the starting point for calculating the extent of departure is the statutory minimum. For example, in *United States v. Pillow*, 191 F.3d 403, 404 (**4th Cir.** 1999), the court held that the starting point for calculating downward departures below the statutory minimum for defendant’s substantial assistance is the statutory minimum. The defendant was convicted of conspiracy to possess with intent to distribute methamphetamine. Although the defendant’s guideline range was 188 to 235 months he was subject to a statutorily required minimum sentence of 240 months. The district court found that, pursuant

to §5G1.1(b), the defendant's statutorily required minimum sentence of 240 months became the defendant's guideline sentence since it was greater than the defendant's applicable guideline range. The government filed motions with the district court for downward departures from the statutory minimum under 18 U.S.C. § 3553(e) and from the guideline sentence under §5K1.1 of the sentencing guidelines and both motions were granted. The district court used the 240 months statutory minimum as the starting point for calculating the extent of both downward departures.

The **Fourth Circuit** affirmed and concluded that section 3553(e) allows for a departure from, *not the removal of*, a statutorily required minimum sentence, thus defendant remains subject to a statutorily required minimum sentence. As a result the court held that the starting point for calculating downward departures below the statutory minimum for defendant's substantial assistance is the statutory minimum. *See also United States v. Head*, 178 F.3d 1205, 1206 (**11th Cir.** 1999), (held that the mandatory minimum represents the appropriate point of a downward departure for defendant's substantial assistance even though the guideline applicable to defendant produces an alternative guideline range).

The **Second and Third Circuits**, in pre-*Koon* decisions, indicated that they favor the use of analogous guideline provisions to guide departures. *United States v. Rodriguez*, 968 F.2d 130, 140 (**2d Cir.**), *cert. denied*, 506 U.S. 847 (1992); *United States v. Kikumura*, 918 F.2d 1084, 1113 (**3d Cir.** 1990). Post-*Koon*, the **Third Circuit** has adhered to the analogical approach dictated by *Kikumura*. In *United States v. Jacobs*, 167 F.3d 792 (**3d Cir.** 1999), the court remanded a 5-level upward departure under §5K2.3 for "extreme psychological injury" because the district court should have specifically articulated the reasons for the degree of the departure. The district court did not engage in the analogical reasoning required under *Kikumura* in arriving at a 5-level departure, as opposed to some other numerical level of departure. Also post-*Koon*, the **Second Circuit** has signaled its continuing approval of the analogical method. In *United States v. Adelman*, 168 F.3d 84 (**2d Cir.** 1999), approved the use of analogizing to the grouping principles as an appropriate basis for determining the extent of its upward departure for threats to people other than the direct victim. The district court created hypothetical counts for each of the multiple victims of the defendant's threats, then, because counts involving different victims are not grouped under §3D1.1, the court calculated a 4-level increase in the defendant's offense level. The court of appeals held that the grouping methodology was not an abuse of discretion.

Also in a pre-*Koon* decision, the **Seventh Circuit** approved using analogies and also treating a §5K2.0 aggravating factor as a separate crime, asking how the defendant would be treated if convicted of it. *United States v. Ferra*, 900 F.2d 1057, 1062-63 (**7th Cir.** 1990). The Seventh Circuit does not read *Koon* as altering its reviewing authority over the magnitude of a departure chosen by the district court. According to that appellate court, although *Koon* changed the standard of review with respect to whether to depart at all, it did not change the circuit's rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. *United States v. Horton*, 98 F.3d 313 (**7th Cir.** 1996). In *United States v. Krilich*, 159 F.3d 1020 (**7th Cir.** 1998), for example, the court reversed a 7-level downward departure based on the district court's statement that the offense level in §2F1.1 overstated the seriousness of the defendant's conduct; the court of appeals held that the district court's reasoning was inadequate to support such a departure.

The **Seventh Circuit** rejected a 10-level upward departure in *United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999), stating, “While this Court has approved of looking to an analogous sentencing guideline in measuring the extent of a departure, we must be mindful that the analogy selected is an appropriate one.” The court of appeals held that the facts of the case did not warrant the district court’s analogy to the terrorism guideline, since the defendant did not attempt to influence or affect the conduct of the government and had at most threatened to use the toxins he had developed against various family members and friends. The court found it significant, in looking at other guidelines, that the defendant could have attempted to use the toxin, even causing significant injury to a victim, and potentially have received a less severe sentence than that which the district court imposed for his conduct in merely possessing a toxin. The court of appeals held that a departure logically should not exceed the level the defendant could have received had he actually committed a more serious offense.

The **Tenth Circuit** has held that, in departing from the applicable guideline range, a district court “must specifically articulate reasons for the degree of departure.” *United States v. Yates*, 22 F.3d 981, 990 (10th Cir. 1994). The district court “may use any ‘reasonable methodology hitched to the sentencing guidelines to justify the reasonableness of the departure,’” including using extrapolation from or analogy to the guidelines. *United States v. Jackson*, 921 F.2d 985, 989-990 (10th Cir. 1990). The **Tenth Circuit** has indicated a view that the *Koon* decision does not affect the analysis of the degree of departure. *United States v. Collins*, 122 F.3d 1296 (10th Cir. 1997). Post-*Koon*, the court has reaffirmed that, while the district court is not required to justify its degree of departure from the guidelines with mathematical exactitude, its justification must include some method of analogy, extrapolation, or reference to the guidelines. *United States v. Whiteskunk*, 162 F.3d 1244 (10th Cir. 1998).

See also *United States v. Simmons*, 215 F.3d 737, 743 (7th Cir. 2000) (held that sentencing courts need not adhere to a mathematic approach in determining the extent of a departure; instead, the law merely requires that district judges link the degree of departure to the structure of the Guidelines and justify the extent of the departure taken.).

The **First Circuit** requires that the court provide a “reasoned justification for its decision to depart” so long as that statement “constitutes an adequate summary from which an appellate tribunal can gauge the reasonableness of the departure’s extent, [the court] has no obligation to go further and attempt to quantify the impact of each incremental factor on the departure sentence.” *United States v. Emery*, 991 F.2d 907, 913 (1st Cir. 1993). No post-*Koon* decision yet indicates the **First Circuit’s** view as to whether the *Koon* affected the analysis of the degree of departure.

In *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998), the court vacated a downward departure because the monetary loss in the case overstated the gravity of the offense for failing to truthfully account for and pay employment withholding taxes. The court concluded that there was no intent to defraud and, therefore, monetary loss was not a proper measure of culpability. The court of appeals noted that the defendant’s intention to repay may remove his case from the heartland of tax evasion, but questioned the appropriateness of the district court’s borrowing from the fraud guidelines the concept of monetary loss overstating culpability. In remanding, the court expressed doubt that the extent of the departure, from a range of 41-51 months to 13 months, was justified, but declined to state a downward limit, noting that the district

court should fully consider three factors weighing against the departure: indications that the defendant may not have intended to repay the entire amount; the defendant's false statements that amounts due to the government had been paid; and the crime of structuring.

Similarly, the **Sixth Circuit** has not outlined its view of whether *Koon* affects the standards for reviewing the extent of a departure. In *United States v. Crouse*, 145 F.3d 786 (**6th Cir.** 1998), the court held that the court should be guided by the structure of the guidelines in its determination of the scope of a departure. The district court in this case had made no reference to the guidelines in determining the extent of the downward departure; the court instead had determined the result—no jail time—and departed downward to a level that would allow this result. Such a methodology is an abuse of discretion.

VI. NOTICE REQUIREMENTS

Sentencing Reform Act's Procedural Amendments

The Sentencing Reform Act of 1984 that initiated the guidelines system also made procedural reforms to achieve the congressional goals of “certainty and fairness” in sentencing. Because a court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment, more formality was thought to be necessary in determining such issues. Federal Rules of Criminal Procedure 32 was amended to provide for adversarial development of the factual and legal issues relevant to determining the appropriate guidelines sentence. The amended rule directs the probation officer to prepare a presentence report addressing all matters germane to the sentence and requires that the report be disclosed to the parties in order that they may file responses or objections with the court. Rule 32 mandates that the parties be afforded “an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.” Fed. R. Crim. P. 32(a)(1).

Burns v. United States

In *Burns v. United States*, 501 U.S. 129 (1991), the U.S. Supreme Court reasoned that the right to be heard on an issue is rendered meaningless unless one is informed that a decision on the issue is contemplated. The Court held that before a district court can depart upward from the applicable guideline range on a ground not identified as a ground for such departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the court give the parties reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure.

The *Burns* requirement has been incorporated into the guidelines as a policy statement: “When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.” USSG §6A1.3(a).

The circuit courts have further refined the concept of what notice is required by Rule 32:

- *United States v. Canada*, 960 F.2d 263 (1st Cir. 1992), found that the *Burns* notice requirements do not apply to upward adjustments to the offense level pursuant to Chapter Three, at least when the basis of the adjustment is known.

Several courts have held that the *Burns* notice requirements do not apply to deviations from the nonbinding policy statements found in Chapter Seven of the *Guidelines Manual*. *United States v. Burdick*, 100 F.3d 882, 885 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1283 (1997); *United States v. Hofierka*, 83 F.3d 357, 362 (11th Cir. 1996), *modified*, 92 F.3d 1108 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 717 (1997); *United States v. Mathena*, 23 F.3d 87, 93 n.13 (5th Cir. 1994); *United States v. Pelensky*, 129 F.3d 63, 70 (2d Cir. 1997).

- *United States v. Morris*, 204 F.3d 776, 778 (7th Cir. 2000), reversed an upward departure based on district court's assessment that a presentence report that referred only to the guideline was sufficient notice to defendant of departure from the guidelines range. The court held that unless the PSR refers not only to the guideline but also to the rationale for the departure and the facts that support this theory of departure, referring to the a specific guideline alone is inadequate.
- *United States v. Dolloph*, 75 F.3d 35 (1st Cir. 1996), *cert. denied*, 116 S. Ct. 1866 (1996), upheld an upward departure where the court did not give notice of two of the grounds for departure stated by the court, but the extent of the departure was fully justified by the ground of which the defendant had notice and there was "no realistic possibility" of a different result on remand.
- *United States v. Gabriel*, 125 F.3d 89, 106 (2d Cir. 1997), applied the *Burns* notice requirement to departures from the guideline fine range.
- *United States v. Lopreato*, 83 F.3d 571 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 187 (1996), upheld an upward departure, stating that, even if notice of the court's intent to depart was not sufficient under *Burns*, the error was harmless beyond a reasonable doubt because the argument the defendant would have made against the departure was explicitly taken into account by the sentencing court.
- *United States v. Pankhurst*, 118 F.3d 345 (5th Cir.), *cert. denied*, 118 S. Ct. 630 (1997), reversed a downward departure when the district court cited grounds not previously noticed; the court held that Fed. R. Crim. P. 32 provides that the government also is entitled to notice of the court's intent to depart. *See also United States v. Andruska*, 964 F.2d 640, 644 (7th Cir. 1992).
- *United States v. Johnson*, 121 F.3d 1141 (8th Cir. 1997), vacated and remanded an upward departure under §5K2.8 based on the cruel and brutal nature of the offense when the presentence report stated explicitly that there were no factors to warrant departure and the possibility of departure was not brought up until just before the court pronounced the sentence.

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